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VINGT ANS APRÈS: RAINBOW WARRIOR, LEGAL ORDERING, AND LEGAL COMPLEXITY

by CHRISTOPHER HARDING*

The intention in this paper is to explore some basic questions concerning the ordering and identity of contemporary international law by reference to what at first sight appears to be a single, though significant incident of international law and relations. The analytical method employed for this purpose is to take a number of narratives relating to the incident and by aligning and comparing such narratives draw some conclusions about the way in which international law interrelates with and affects the operation of other legal orders. In this way, both the role and identity of the international system, and its normative siting, may be clarified. The actual focus for this discussion and basis for narrative analysis is provided by the well-known "*Rainbow Warrior* incident" in the mid 1980s (hence "Vingt Ans Après") and its aftermath: the destruction by French government agents of the Greenpeace ship *The Rainbow Warrior* in Auckland Harbour in New Zealand in July 1985 and the political and legal resolution of that incident.

I. INTRODUCTION

How easy is it now to draw the boundaries or specify the content of international law? At a time when new supranational legal regimes, in relation to such diverse matters as human rights, maritime issues, or trans-national trading, are quickly emerging on a global scale, and when international norms are being translated into national legal orders with increasing frequency, the shape and working of international law seems both more significant yet also less certain.¹ Thus the rules of the international system operate within a multi-level and less easily mapped space and are substantively, though not always transparently, more pervasive. Such observations raise fundamental questions relating to the identity of the international order and its principal actors and to the relationship between the international and other types of legal systems. The purpose of this discussion is to explore and illuminate such basic questions of ordering and identity by reference to what at first sight appears to be a single, though significant, incident of international law and relations. The analytic method which will be employed for this purpose is based upon a number of narratives relating to this incident, and by aligning and comparing these narratives, draw some conclusions about the way in which contemporary international law interrelates with and affects the operation of other legal orders. In this way, both the role and identity of the present international system, and its normative location, may be clarified.

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¹ As the editors of a collection of papers published at the turn of the century noted: "Nor so long ago, the scope of the discipline would have been relatively uncontroversial and debate as to its nature revolved around certain principal competing theoretical conceptions. But today the landscape of international law is rich in its diversity, at times confusing on that account." See Christopher Harding & C. L. Lim, "The Significance of Westphalia: An Archaeology of the International Legal Order", Chapter 1 in Harding & Lim, *Renegotiating Westphalia* (The Hague: Martinus Nijhoff, 1999) at 1.

The factual focus for this discussion and basis for narrative analyses is provided by the well-known "*Rainbow Warrior* incident" in the mid-1980s and its aftermath: the destruction by French government agents of the Greenpeace ship *The Rainbow Warrior* in Auckland Harbour, New Zealand, in July 1985 and the political and legal resolution of that incident.² It will be seen that the narration of these events provides fertile ground for jurisdictional and jurisprudential reflection, the various narrative accounts occupying the domains of international relations, international law, national law and also an uncertain borderline region—or possibly another kind of domain altogether—between the two types of legal order. The main lines of enquiry which will emerge from this discussion concern the boundaries of legal ordering, the identity and legal personality of different kinds of actors, and the exploitation of legal and political argument in a multi-level environment of governance.

The discussion may be started by presenting a number of different narratives of the "*Rainbow Warrior* incident", which will supply a factual account of the incident itself and also provide a number of different perspectives on the course of events arising from the incident.

II. NARRATIVES

In the narrowest sense, the central event in this account—the destruction of the Greenpeace ship *Rainbow Warrior*—was an "international incident" since it involved an illegal act committed by the agents of one State within the territory of another State. A narrow legal perspective would then see the matter as a clear violation of one State's sovereignty by another. Yet it was much more than that, in both political and legal terms, and the complexity of the incident, its consequences and surrounding circumstances may be appreciated by reference to a number of contexts, three of which will be prominent in the following discussion. The first context is *systemic*—the coexistence and interaction of the systems of international relations and law, since the subject under discussion is very much a matter of both law and politics. The second is *jurisdictional*, since the event led to legal processes within a number of jurisdictions, again involving some interaction between them. The third main context is one of *agency*, concerning the actors involved in the incident and its aftermath, both human and institutional, playing out different roles in different legal orders. These main contexts of discussion may be borne in mind and should emerge more clearly from the presentation of the narratives.

A "narrative pathway analysis" of the *Rainbow Warrior* incident is now provided immediately below in a number of separate narrative accounts: (1) a purely factual version, presented as neutral in analytical terms; (2) a summary "political" account; (3) a second "political" account which locates the incident within a longer term narrative of the global debate on nuclear testing; (4), (5) and (6) three "international legal" accounts—two more conventional, focussing on inter-State relations, the third less conventional, focussing on the relationship between the State and non-State actors; and (7) a "national legal" account, focussing on the criminal proceedings taken against the French agents apprehended in connection with the incident.

1. Factual narrative

A Greenpeace vessel was blown up in Auckland Harbour by French secret service agents as it was leaving to protest against French nuclear tests in the Pacific. The two agents were convicted of offences under New Zealand criminal law and each sentenced to ten years imprisonment. Following negotiations, the two states referred

² For details, see: I. Gidley & R. Shears, *The Rainbow Warrior Affair* (London: Unwin Paperbacks, 1986); M. King, *Death of the Rainbow Warrior* (London: Penguin Books, 1986); Sunday Times Insight Team, *Rainbow Warrior* (London: Arrow Books Ltd, 1986); C. Lecomte, *Coulez le Rainbow Warrior* (Paris: Messidor/Éditions sociales, 1985).

all issues arising out of the incident ... to the UN Secretary-General for arbitration, the award to be "equitable and principled". After written pleadings, the Secretary-General, without giving reasons, ruled that France should formally apologise to New Zealand for "the violation of its sovereignty and rights under international law" and should pay 7 million US dollars to New Zealand "as compensation for all the damages it has suffered" ... The ruling also required New Zealand to transfer the agents to French custody, to be kept by France "in a French military facility on an isolated island outside of Europe for a period of three years".³

2. Summary political narrative

On 10 July the "flagship" of Greenpeace *The Rainbow Warrior* was blown up in Auckland Harbour, New Zealand, killing a photographer. Two French secret service agents were tracked down and arrested. They pleaded guilty to manslaughter and sabotage and were imprisoned for a short while in French Polynesia, before returning to France, allegedly for medical treatment. The Prime Minister of New Zealand David Lange described the affair as "sordid, state-backed international terrorism". The affair affected French domestic politics but also increased international concern over policies for nuclear testing in French Polynesia.⁴

3. Long political narrative

France began its programme of nuclear testing at Mururoa Atoll in French Polynesia in 1966. Until 1974 these tests were atmospheric.⁵ The Nuclear Test Ban Treaty of 1964 had prohibited the testing of nuclear weapons on the high seas, but France was not a party to the Treaty and continued atmospheric nuclear tests until 1973. Tests carried out in 1972 and 1973 were the subject of protests by several States and led to claims by Australia and New Zealand against France before the International Court of Justice, to question the legality of these tests.⁶ Since France indicated that it would not carry out further atmospheric tests, the cases were taken off the Court's list, although the applicants sought a declaration from the Court that further nuclear testing in the South Pacific would be contrary to international law.⁷ Underground testing by France continued until 1992 and was the subject of protests by both States and N.G.Os, especially Greenpeace which actively and aggressively campaigned against the testing programme.⁸ France's policy also led to some popular economic boycott of French trade, and anti-nuclear rallies in a number of places. In 1992 French President Mitterand ended the testing programme in order to comply with guidelines under the Non Proliferation Treaty, but his successor Chirac lifted a three year moratorium in 1995 and another series of eight underground tests took place in 1995-6. During this period there were further clashes involving Greenpeace boats, after which Greenpeace made legal claims, alleging a violation of basic rights and seeking compensation. French Polynesian citizens have also brought claims, alleging a violation of basic rights by France under both the European Human Rights Convention and the International Covenant on Civil and Political Rights. The tests

³ Extracted from D. J. Harris, *Cases and Materials on International Law*, 5th ed. (London: Sweet & Maxwell, 1998) at 502.

⁴ Extracted from Peter Teed, *A Dictionary of 20th Century History 1914-1990* (Oxford: Oxford University Press/BCA, 1992) at 390. The photographer who lost his life was a Dutch crew member, Fernando Pereira.

⁵ For a contemporary discussion of the legality of these tests, see the discussion in the casenote by Mercer, (1968) *New Zealand Law Journal* at 405-8.

⁶ *Nuclear Tests (Australia v France)* [1974] I.C.J. Rep. 253; *Nuclear Tests (New Zealand v France)* [1974] I.C.J. Rep. 457 [New Zealand].

⁷ *New Zealand*, *ibid.* at 460.

⁸ Indeed, the *Rainbow Warrior* incident of 1985 arose out of this campaign by Greenpeace.

were ended in February 1996 and in May of that year France signed the Comprehensive Test Ban Treaty. In December 1996, the *Tribunal Administratif* of Papeete (in Tahiti) quashed a decree expelling Greenpeace co-founder David McTaggart from Polynesian territory.

4. International legal narrative (1)

Following the violation of New Zealand sovereignty by France in 1986, through the sabotage of the Greenpeace ship by French agents in Auckland Harbour, the legal issues between the two States arising from the incident were submitted to the arbitration of the UN Secretary-General. The two States had failed to reach agreement on the matter themselves. In his award,⁹ handed down in July 1986, the Secretary-General ruled that there should be a formal apology by France in respect of the violation of New Zealand's sovereignty, payment of compensation (US\$ 7 million) for material damage, and that the agents (having been convicted and imprisoned under New Zealand criminal law), should be transferred to French custody and confined in a military facility for a period of three years. The French Government was to be accountable to that of New Zealand in relation to the continuing confinement of the agents, and any subsequent problems regarding the implementation of the ruling were to be submitted to arbitration. This arbitration provision was subsequently invoked in 1990, following the French release of the two agents in 1988, and France was declared to be in breach of the settlement and ordered to pay compensation (US\$ 2 million) to New Zealand for non-compliance with the conciliation ruling.¹⁰

5. International legal narrative (2)

During the period of unsuccessful negotiation of a settlement between France and New Zealand following the conviction of the French agents in New Zealand, the latter alleged that France was using trade measures (EU import barriers) in order to force a settlement. New Zealand had already referred the matter to the OECD and the Director General of GATT, before it was taken up and dealt with as part of the Secretary-General's conciliation decision. France denied the allegations made by New Zealand but indicated a willingness to give undertakings relating to trade. The Secretary-General ruled that France should not oppose imports of New Zealand butter into the UK above certain levels specified by the European Commission; nor take any measures which might impair the implementation of the New Zealand—EEC Agreement on Trade in Mutton, Lamb and Goatmeat.

6. International legal narrative (3)

The international pressure group Greenpeace, which had been actively campaigning since 1971 for environmental protection, had for some 15 years been particularly engaged with the French policy of continuing nuclear tests and had employed its usual method of direct, non-violent protesting on this issue. The Greenpeace vessel *Rainbow Warrior* was the subject of a direct attack by agents of the French Government when it was blown up and destroyed in Auckland Harbour in July 1985. In December 1985, France and the "Stichting Greenpeace Council" (acting for itself, organisations associated with Greenpeace, and the owners and operators

⁹ UN Secretary-General Ruling on the *Rainbow Warrior* Affair between France and New Zealand, 6 July 1986, 26 I.L.M. 1346 [Conciliation Proceedings]. For discussion, see Michael Pugh, "Legal Aspects of the *Rainbow Warrior* Affair" (1989) 36 I.C.L.Q. 655.

¹⁰ *Rainbow Warrior (New Zealand v France)* Arbitration Award, 30 April 1990, 20 (1990) RIAA 217; reprinted in L. Guruswamy, W. R. Palmer & B. H. Weston, *International Environmental Law and World Order*, (Minnesota: West Publishing Company, 1994) at 163-68. See the discussion by Scott Davidson, "The *Rainbow Warrior* Arbitration Concerning the Treatment of French Agents Mafart and Prieur" (1991) 40 I.C.L.Q. 446.

of the vessel) entered into a compromise, agreeing to negotiate a settlement providing compensation to Greenpeace. In the event of failure to reach agreement, the matter would be put to named arbitrators, whose sole function would be to decide appropriate compensation. It proved necessary to establish such an arbitral tribunal, whose judgment was agreed to be binding and was handed down in October 1987.¹¹ The reasons for and proceedings of the arbitration remained confidential, but it was stated that the arbitral award was based on the common law concept of aggravated damages and on the waiver of sovereign immunity. The tribunal made a number of awards of compensation and decisions regarding costs.

7. National legal narrative

Following the sabotage of the Greenpeace vessel in Auckland Harbour in 1985, which involved the blowing up of the ship and the killing of a crew member, two French secret service agents were arrested, tried and convicted under New Zealand criminal law of manslaughter and arson for their part in the sabotage of the ship (but not the actual planting of the bomb). Although the French Government eventually admitted responsibility for ordering the sabotage, the agents were not allowed to plead a defence of superior orders to avoid liability under New Zealand law. They were both sentenced to prison terms of 10 years but following the conciliation decision of the UN Secretary-General, were transferred to the custody of France to be detained for a further period of three years in a French military facility on the Pacific island of Hao in French Polynesia. The New Zealand government was given authority to monitor the continuing detention of the agents. The release of the agents in 1988 led to complaint by New Zealand and an arbitral award, which found France to be in breach of its international obligations to New Zealand under the conciliation ruling and required the payment of compensation to the latter.

A first reading of this comparative narrative presentation should convey some sense of the multi-layered character of the "dispute", in terms of legal jurisdictions, legal personality and its general politico-legal character. The first "factual" narrative is presented as a neutral account, although it must be conceded that no account can be wholly neutral and objective, since any presentation of "factual" data will inevitably involve a process of editing and selection. The first "political" narrative is evidently different, in both its selection of key facts and its nuance, from most of the other narratives. It is loose in its presentation of legal events and significantly uses the political statement of a Head of State to transform a government into a terrorist organisation. The international legal narratives are constructed around two bilateral relationships, firstly that between France and New Zealand (as seen in narratives (4) and (5) (and more conventionally in legal terms)), and secondly that between France and Greenpeace (as seen in narrative (6) (and less conventionally)). The third international legal narrative (Number 6) is less unequivocally one of international law, since it may be questioned whether Greenpeace has international legal personality and under which legal order the compromise and arbitral arrangements are operating. Interesting questions may be posed regarding the legal identity and role of the entity described as the "Stichting Greenpeace Council". The national legal narrative is to some extent a more familiar "legal" tale of criminal proceedings, but complicated by the intrusion of international relations.

It should be made clear at this stage the kind of benefit and insight that may be achieved through this retelling of events in a series of different narratives. From a jurisprudential standpoint, a major interest in the present discussion relates to the way in which the same actors, involved in a single event, may perform different roles on different political and legal stages. Separating these roles through the examination of different narrative pathways may

¹¹ Re *The Rainbow Warrior* (*Greenpeace v France*) Arbitration Award, 2 October 1987 (summary French text in (1987) 33 A.F.D.I. 923-4).

aid an understanding of the interaction of these political and legal stages or domains (commonly referred to as "orders", "systems", "regimes" or "jurisdictions", partly depending on the disciplinary context of discussion). An important point to take on board is that whatever distinctions are drawn between either law and politics, or between legal systems and jurisdictions, none of these domains of action exist in isolation, and their mutual impact is both dynamic and a clue as to the operation of each. Therefore, a narrative pathway analysis enables an external observer to experience (as it were, to get inside) a succession of "internal" perspectives but at the same time appreciate the interaction between the latter. An important element in this process is to be able to see the same actors in different roles. The value of such a resort to narratology is indicated by Toolan in the following terms:

... a narrative is *never* without contexts which both shape and come to be shaped by the story that is being told and heard The teller and addressees of the very same narrative may assume quite different grounds for that tale being told, and may individually deduce rather different "points" from the story, grounds for its tellability, and real-world consequences. It is because the same narrative inevitably has some effect on its addressees and consequences in the real world (whether or not these consequences are overt or hidden) that we have to recognise that narratives are, among other things, a kind of political action. Narratives, in short, carry political and ideological weight.¹²

Just as this may be true of individual narrative accounts, it may be even more true of different narrative accounts of the same event.

In this way it may be readily appreciated that the political, international law and national law narratives of the *Rainbow Warrior* incident each have different grounds for telling the story and suggest different consequences (respectively (perhaps): "the vindication of the rights of a smaller State against the abuse of power by a larger maverick State", "the struggle for but eventual achievement of an international resolution", and "the compromise of national criminal law interests"). But also, a different perspective, and hopefully further understanding, may be achieved by hearing the longer-term narrative, which locates the *Rainbow Warrior* incident as one episode in a longer tale of nuclear weapons testing. The value of this latter narrative, with its longer time span and larger group of actors, is that it allows the addressee of the narrative to understand further the motivations and interests of the actors involved in the specific incident, and to appreciate how the latter relates to, is affected by, and itself affects the longer and wider story.¹³ Finally, it may be said that this narrative method more specifically reveals something of jurisprudential value regarding the operation and interrelation of legal orders and jurisdictions.

III. RAINBOW WARRIOR: MAPPING THE LEGAL ORDERS

Before proceeding to draw some significant points of analysis and argument from the exercise, it would be useful to map out in a more descriptive way the orders or domains within which the narrative action takes place. The background to the *Rainbow Warrior* incident, the resolution of the incident, and its aftermath would appear to occupy three types of legal order: the international, the European, and the national.

¹² Michael J. Toolan, *Narrative: A Critical Linguistic Introduction* (New York: Routledge, 1988) at 227.

¹³ In this way, the kind of analysis undertaken here may share some of the objectives of the "international incidents approach" advocated by Michael Reisman & Andrew Willard, studying normativity through incidents in order to gain a fuller picture which also reveals more of the interrelation between the processes of law and politics. See W Michael Reisman & Andrew R Willard, eds., *International Incidents: the law that counts in world politics* (Princeton: Princeton University Press, 1988). As Reisman himself argues (at page 6): "International lawyers pay relatively little attention to the incidents from which political advisors infer their normative universe. Rather, they persist in constructing their normative universe from texts."

At first glance the “core” incident—the blowing up of the ship—is a classical issue of international law: a violation of one State’s sovereignty by the agents of another State, raising and resolved as a matter of State responsibility. The principal actors are the two States, although the process of dispute resolution was to involve the formally agreed participation of the UN Secretary-General. Although much of Perez de Cuellar’s settlement was a conventional application of the rules of State responsibility, aspects of his ruling also impinged upon other regimes, those of the European Community (EC) and national criminal law. In a sense, the conciliation decision itself established a special regime of international law governing the resolution of any consequential disputes.

It may be worth just commenting a little further at this point on this perspective which bases itself on the France-New Zealand nexus and views the matter substantively as a legal issue of State responsibility. For it is this particular reading of the subject that has found its way into the “lore” of international law for many legal practitioners and students of the subject. Or, rather, it is not even the main incident—the destruction of the Greenpeace vessel—but the aftermath event of the premature release of the French agents from custody in 1988, and the 1990 arbitration award relating to the latter, which figures so strongly in “conventional” international law readings. For instance, in James Crawford’s *legally* very significant commentary on the International Law Commission’s Articles on State Responsibility¹⁴ there are a large number of references to a number of points arising from the 1990 *Rainbow Warrior* arbitral award. But the effect of this is to abstract legal argument from the actual context of the dispute into the general theory of State responsibility. In this way, Crawford is forging a very “thin” narrative of the *Rainbow Warrior* case or events.¹⁵ Similarly, it may be seen that references to *Rainbow Warrior* in the latest (sixth) edition of Harris’ *Cases and Materials on International Law*¹⁶ are confined to the 1990 arbitral award, while the summary of the dispute, quoted above as the “factual narrative” and taken from the previous edition of Harris’ work, has disappeared altogether. The uninformed reader of Crawford’s commentary or the latest edition of Harris’ book would not therefore easily know what “*Rainbow Warrior*” was about, and especially the background to the dispute and its distinctive legal features, apart from the fact that it involved an unauthorised release of prisoners. Likewise, the arbitral award is extracted in Damrosch, Henkin, Pugh, Schachter and Smit’s text on international law¹⁷ for its discussion of the impact of force majeure, distress and necessity on the issue of State responsibility, and this is what *Rainbow Warrior* will mean to a generation of American law students raised upon a reading of such material. All of this serves to demonstrate how a “thin”, “lawyer’s” reading of (part of) a case or dispute can miss some of the crucial dynamic (and thus understanding) of the event as a whole.

The wider context of the dispute includes a number of specialised international legal regimes: customary and treaty law relating to nuclear testing, and in relation to the latter, some claims concerning the violation of human rights under both the *European Convention on Human Rights*¹⁸ (applying here to Pacific Island territories) and the *International Covenant on Civil and Political Rights*.¹⁹ Arguments relating to both State responsibility

¹⁴ James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002).

¹⁵ For instance, from Crawford’s account it is not clear why the “officers” were confined on the island of Hao in the first place, and the role of Greenpeace is quite forgotten. In fact, Crawford’s narrative account (*ibid.*, at 175–176) centres very much on the distress of the French officers, in a way, therefore, skewing the morality of the longer-term *Rainbow Warrior* narrative.

¹⁶ D. J. Harris, *Cases and Materials on International Law*, 6th ed. (London: Sweet and Maxwell, 2004).

¹⁷ Damrosch *et al.*, *International Law: Cases and Materials (American Casebook Series)*, 4th ed. (Minnesota: West Group, 2001) at 704–8.

¹⁸ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, U.N.T.S. 221, Eur. T.S.5.

¹⁹ 19 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

and specialised treaty regimes occur again at a later date. Following France's resumption of nuclear testing in 1995, the Parliament of the Australian Capital Territory (Canberra) voted to ban the government purchase of French goods. In response, France threatened legal action against the Australian Capital Territory, alleging that this was a violation of international trade (World Trade Organisation (WTO)) rules. It is possible therefore, to locate the dispute and its essential context within a number of international legal regimes, of both general and more specialised scope.

In addition, the settlement between Greenpeace and France appears, at first sight, to be achieved through an international arbitration. The process is clearly not located within any national legal order, although the arbitrators were required to apply rules of English law and the "common law" concept of aggravated damages. Yet, intriguingly, it may be asked where and how this process may be located within the international legal order. Does the Greenpeace organisation possess international legal personality? Apart from the waiver of sovereign immunity, what rules of international law were applied? Would any enforcement of the arbitration be a matter of international law? If this is happening in the international legal order, it must surely be international law of a specialised and unconventional character.

Despite the geographical location of both the *Rainbow Warrior* incident itself (New Zealand) and the nuclear testing (French Polynesia), the legal argument spilled into the European legal domain. The UN Secretary-General had to consider allegations relating to the behaviour of France as a member of the EC, and France subsequently gave undertakings as to its future behaviour within the EC. Moreover, at a later date the legality of the renewal of nuclear testing by France was challenged under the Euratom rules. Similarly, the claim regarding the violation of human rights brought another European system, the European Court of Human Rights (ECHR) regime, into the picture.

Finally, there is the national legal level. Part of the resolution of the incident is clearly within the domain of New Zealand criminal law (indeed the prosecution of the two agents in New Zealand supplied one of the most obvious narratives). With the agreement to transfer the prisoners to French jurisdiction, the French legal order becomes a significant stage for some of the subsequent events. At a later date, the French legal system (within French Polynesia) provides the basis for enforcement action against Greenpeace (seizure of boats, exclusion orders) and later claims for compensation on the part of Greenpeace.

This mapping of legal systems may be aided by the summary of legal processes laid out in Table 1 below.

IV. NEW ZEALAND VERSUS FRANCE: CONCILIATION AND THE SECRETARY-GENERAL'S REGIME

In terms of legal interest, a central aspect of the legal process arising from the *Rainbow Warrior* incident was the resolution of the claims made by New Zealand against France. In itself, the outcome was of interest as an example of the use of the office of UN Secretary-General in the role of conciliation, following the inability of the parties to reach a negotiated settlement.²⁰ The issue was in principle one of State responsibility and thus a matter of applying rules of international law; but, as already noted, some of the arguments and therefore the resolution impinged on the operation of other legal orders, most obviously national criminal law within New Zealand and France, and less directly rules and procedures within the EC legal order.

Conciliation is an established method of dispute settlement in international law; usually the proposed settlement made by a conciliator is not legally binding on the parties, but in this

²⁰ By September 1985 the French Government was prepared to admit that the destruction of the ship was an official act and thus accepted responsibility as a matter of international law. Responsibility as such was not therefore a legal issue, but the negotiations, carried out during the following months, failed to reach agreement on the amount of compensation and the position of the convicted French agents.

Table 1.
Rainbow Warrior and Nuclear Testing: a Profile of Legal Disputes.

New Zealand v France	Nuclear Test Cases (also Australia, ICJ, 1974) <i>Rainbow Warrior</i> (1) (UN Secretary-General's Conciliation, 1986) <i>Rainbow Warrior</i> (2) (Arbitration on release of prisoners, 1987)
Greenpeace v France	<i>Rainbow Warrior</i> compensation claim: negotiation and arbitration (1987) Nuclear tests: Euratom claim (1995) Nuclear tests: challenge of presidential decree (French Conseil d'Etat, 1995) Seizure of ships: compensation claim (1996)
France v Greenpeace	Exclusion zones, seizure of ships, exclusion of personnel (1995, 1996)
France v Australian Capital Territory	Threatened legal action in response to trade boycott (1995)
Individuals	New Zealand criminal proceedings against the French agents (1985) <i>Rainbow Warrior</i> compensation (killed crew member) negotiation (against France, 1985-6) Euratom claim (1995) ECHR claim (human rights violation, against France, 1995) ICCPR claim (human rights violation, against France, 1996) Legal challenge of expulsion decrees (against France, Tribunal Administratif (TA) Papeete, TA Paris, 1996-7)

case France and New Zealand agreed in advance to accept the Secretary-General's rulings. The settlement itself subsequently included its own mechanism to ensure a legally binding regime for its implementation: ruling number 6 provided that "the two Governments should include and bring into force as soon as possible binding agreements incorporating all of the above rulings".²¹ In effect, this locked the two States into a special legal regime relating to the resolution of the dispute, including a provision for arbitration on any future disagreements arising from the implementation of the settlement not able to be resolved by diplomatic means. The significance of this "New Zealand—France settlement regime" was evident in the subsequent activation of the arbitration procedure in relation to the disputed "release" of the French agents from confinement on Hao Island, and the award of a further US\$ 2 million compensation to New Zealand in respect of non-compliance by France with the terms of the settlement.²² This proved therefore to be a settlement regime with some bite.

But if the process and its outcome appear positive in terms of achieving an authoritative settlement and reassertion of basic principles of international law, this has to be set in its particular political context. New Zealand occupied the legal and moral high ground, and therefore also the political high ground. In the wider context, France was already relatively isolated regarding its position on nuclear testing. Moreover, while in truth its tactics against

²¹ The Secretary-General's rulings were confirmed by the two States in three separate agreements concluded by exchange of letters, 9 July 1986 (N.Z.T.S., 1987, No 16).

²² In fact, the award of compensation was made in principle, since New Zealand had sought only *restitutio in integrum* (i.e. return of the prisoners) and categorically rejected any alternative compensation. In the event the Tribunal recommended the setting up of a joint fund to promote harmonious relations between the two States, and that France should make an initial contribution of US\$ 2 million to this fund.

Greenpeace may not be a unique example of State terrorism, on this occasion France may have been unlucky in being exposed, and New Zealand had a strong bargaining counter in having two of the terrorist agents in custody. Generally, France was in the position of an "outlaw", in a political minority on the wider issue, and weakened by smoking gun evidence on the particular issue. French government involvement had been initially uncovered by a dedicated investigation by its own domestic press,²³ and the Mitterand Government was generally under heavy political pressure.²⁴ In short, it was a favourable moment for a strong legal settlement.

In legal terms, what may be more notable about the settlement was its reach and interaction with other legal regimes. The impact on national criminal justice will be further considered below. But there is also some linkage with the European legal space, which provides some evidence of the increasingly pervasive and mixed character of international normativity. It may be most accurate to view this particular relation as one of *complementarity*: the international resolution located the complaint regarding France's "trade sanctions" within the EC legal context²⁵ and resulted in an undertaking by France, in effect, not to abuse its position within the European legal framework, in particular with reference to EC norms and standards. Thus one undertaking by France relates to the import of New Zealand butter into the UK: not to oppose these continuing imports so far as they comply with the maximum levels set by the EC Commission.²⁶ In this respect, the international resolution incorporates and relies upon provisions and legal obligations within the EC order. The second French undertaking relates to an international agreement, the *New Zealand/EC Agreement on Trade in Mutton etc of 1980*,²⁷ but one that links the operation of the two legal orders. The undertaking not to impair the implementation of this agreement is a measure of complementarity which seeks to affirm legal obligations under both international and EC law. It is of course possible still to draw formal distinctions between the two legal orders, but in a substantive sense the boundaries between the two are less clear-cut. There is an over-lapping and mutual reinforcement which is increasingly characteristic of different legal regimes dealing with the same subject-matter.²⁸ A similar observation may be made in relation to the protection of human rights, as discussed further below.

V. NEW ZEALAND VERSUS MAFART AND PRIEUR: THE CRIMINAL LAW DIMENSION

The fate of the two French agents, Mafart and Prieur, who had been apprehended and subsequently convicted under New Zealand criminal law for their role in the destruction of the ship, was the main stumbling block in the negotiations between France and New Zealand. This was not only a political issue, but a situation which raised an important legal question concerning the relationship between international law and national criminal law, involving matters of basic legal principle.

²³ On the role of the French press during the summer of 1985, see in particular Lecomte, *supra* note 2.

²⁴ For instance, on 12 September 1985 the European Parliament had condemned French secret service activity against Greenpeace and demanded a full explanation from France.

²⁵ In the Conciliation Proceedings France denied that "trade issues have been imported into the affair"; or, put another way, that there was a connection between its EC actions and the dispute with New Zealand. Following complaints by New Zealand about trade barriers in February 1986, the EC Commissioner for Trade had upheld the complaint on 4 April, and France admitted that it had set up barriers on 22 April. See Pugh, *supra* note 9 at 657.

²⁶ See Ruling No. 4 (a), Conciliation Proceedings, *supra* note 9.

²⁷ *Agreement in the form of an exchange of letters between the European Economic Community and New Zealand on trade in mutton, lamb and goatmeat*, Official Journal L 275, 18/10/1980 P. 0028-0035.

²⁸ See the discussion in Christopher Harding, "The Identity of European Law: Mapping Out the European Legal Space" (2000) 6 Eur.L.J. 128.

France sought the immediate release from imprisonment of the two convicted agents. The French position was based on the argument that, following the French Government's admission of responsibility, the matter was one of international legal responsibility, which would be satisfied by France's formal apology and payment of compensation to New Zealand; moreover, since the agents were acting under orders, they should not be seen as responsible actors in relation to the illegal act. This, in a sense, is a kind of double jeopardy argument, in two parts: first, that the injury was sufficiently dealt with at the international level; and, secondly, that it arose from a single illegal act which was attributable to the French State and not to its agents. On this argument there was, after all, then no scope for the application of New Zealand criminal law. In support of this argument France referred to that part of the classic statement by US Secretary of State Webster in the *Caroline Incident* dealing with individual responsibility of State agents:

after the avowal of the transaction as a public transaction, authorised and undertaken by the British authorities, individuals concerned in it ought not to be holden personally responsible in the ordinary tribunals for their participation in it.²⁹

New Zealand's position, in response, was based on a "dualist" view of legal ordering. Thus, whatever the outcome in terms of the international law of State responsibility, in the context of the separate system of national law it was clear that a criminal offence had been committed and some criminal responsibility was attributable, in principle, to the French agents. As a matter of abstract argument, there might have been a solution within the terms of New Zealand criminal law, by allowing a defence of superior orders to relieve the agents of liability. But this had been ruled out in New Zealand's memorandum to the Secretary-General, which argued that the "Nuremberg" rejection of superior orders as a defence³⁰ applied as a matter of both international and national law. So it became a matter, in the wording of the conciliation ruling, of the "integrity of the New Zealand judicial system": the agents were clearly liable in terms of New Zealand criminal law, and it would therefore compromise the application of the latter to allow the international level resolution effectively to replace the continuing application of national sanctions.

Eventually, of course, the matter was resolved by agreeing on the transfer of prisoners, but this solution left unresolved the underlying theoretical problem of jurisdiction and responsibility. Another way of expressing this problem would be in the language of monist and dualist arguments. A simple dualist view would maintain that there are two distinct legal orders, and thus two distinct wrongs or offences, committed by different actors. In this way, the violation of State sovereignty is conceived separately from the specific criminal offences of arson and manslaughter, as matters of separate agency relating to the protection and vindication of different interests. A monist view, on the other hand, would subsume the specific national offence within the broader international violation, arguing that the two are closely related, especially in that the agents were acting exactly as *agents* of the French Government, as a kind of physical embodiment and *alter ego* of the French Government in Auckland Harbour—they were one and the same, and the legal violation was one and the same. Thus the issue remains open to debate, illustrating graphically the overlapping and interaction of the two kinds of legal order in a way that is now not uncommon. Again, it

²⁹ 29 *British and Foreign State Papers (BFSP)* 1137-8; 30 *BFSP* 195-6. There is another instructive long-term narrative involving illegal attacks on ships, in that the *Caroline's* destruction at Niagara Falls is a precursor of that of the *Rainbow Warrior*. In the *Caroline* case, it was a British subject, McLeod, who had been arrested in the United States on charges of murder and arson.

³⁰ See Pugh, *supra* note 9 at 657. The judgment of the International Military Tribunal at Nuremberg (1946) rejected both the defence of sovereignty overriding personal responsibility and that of superior orders. The latter had been specifically covered in Article 8 of the Tribunal's Charter, which allowed it as a ground of mitigation, but not a defence to responsibility, see (1947) 41 *Am. J. Int'l L.* 172 for the Tribunal's judgement.

is the problem of ascertaining boundaries. What may be drawn specifically from the *Rainbow Warrior* arguments, however, is the example of the French attempt to *internationalise* the dispute, in the sense of making it a subject for international rather than national legal resolution. Thus on 9 September 1985 France told New Zealand that the suspected agents "should enjoy all the guarantees of international law".³¹ This was undoubtedly opportunistic in the circumstances,³² but it demonstrates how the uncertainties of legal ordering (is it international or national?) may be exploited in legal argument.

The actual solution evades the jurisprudential dilemma by means of a practical compromise. The agreement to transfer the custody of the convicted agents (strictly speaking, not their sentence) concedes something to both sides. The full application of the sanction under New Zealand law is compromised, yet France has to agree to some continuing detention and be accountable for that to New Zealand. This represents a classic *ad hoc* solution, very much *ex aequo et bono* according to the circumstances of the particular case.³³ The specific outcome was to establish a variant of the transfer of prisoner arrangement which is now possible as between a number of jurisdictions, for example, on the basis of the 1983 *Council of Europe Convention on the Transfer of Sentenced Persons*.³⁴ The transfer of the French agents to French custody was closely defined in terms of period and location, and the provision for New Zealand to monitor the custody.³⁵ If the integrity of New Zealand criminal justice had been compromised, so too was French sovereignty over its own system of detention, and this was subsequently well illustrated by the objection by New Zealand to what it considered to be premature release of the agents, and the arbitral award against France on this issue.³⁶ In this respect, the operation of national criminal justice appears to be very much subject to international regulation.

VI. GREENPEACE VERSUS FRANCE: THE TWILIGHT ZONE OF INTERNATIONAL AND NATIONAL LAW

The multi-layered character of the *Rainbow Warrior* incident is further evident when considering the identities of the injured parties in the dispute. The destruction of the ship injured directly (a) the sovereignty of New Zealand (a sovereign State actor), (b) Greenpeace as the owner of the boat (a non-State actor), and (c) the individual crew member who lost his life. The settlements with Greenpeace and the family of the deceased crew member, Pereira, were achieved respectively through arbitration and negotiation. In both these latter cases it is

³¹ See Pugh, *supra* note 9 at 657.

³² It is of course interesting to reflect on France's preference for an international level resolution in this particular situation. It may be speculated that, following the apology and payment of compensation, the matter would be "done and dusted", but the continuing imprisonment of the French agents in New Zealand would be an ongoing reminder of proven French delinquency.

³³ As Brownlie asserts, the "power of decision *ex aequo et bono* involves elements of compromise and conciliation". See Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003) at 26. It is sometimes distinguished from equity, in that it may then involve a compromise of existing rights in favour of expediency. The task given to the Secretary-General was to deliver a ruling which was "equitable and principled".

³⁴ 32 ILM 530; European Treaty Series No 112. See the discussion by Désirée Paridaens & Christopher Harding, "The Transfer of Prisoners with Special Reference to the Netherlands and the UK", Chapter 18 in Phil Fennell *et al.*, eds., *Criminal Justice in Europe: A Comparative Study* (Oxford: Clarendon Press, 1995).

³⁵ The detention was specified for a period of three years at a military facility on the Island of Hao. The ruling required the consent of New Zealand for either agent leaving the island, periodic reports on the detention to the Government of New Zealand and the UN Secretary-General, and third party inspection of the conditions of detention. Moreover, the conditions of detention were strictly defined in terms of their isolation from the outside world, and especially any contact with media.

³⁶ The agents were allowed to return to France on respectively health and compassionate grounds, but this was done without the required consultation. Arguably, France thereby "bought itself out" of that part of the settlement, since the Arbitral Tribunal did not order the return of the prisoners, as requested by New Zealand.

interesting to reflect on the legal personality of the actors involved and the provenance of the legal process. The dispute in both cases is between a State on the one hand and non-State actors (a non-governmental organisation (N.G.O.) and human individuals) on the other hand. In both cases there is a legal settlement, based on the admitted legal responsibility of the French State. But where exactly, in terms of legal order, do these settlements occur?

Arguably, the legal process in these cases can be located properly neither within the international legal order nor within that of any national legal system. In substantive terms, there is an intriguing mixture of rules involved. The responsibility of the French State for the destruction of the ship and the death of Pereira was formally based upon its admission of responsibility to New Zealand for purposes of international legal responsibility for the violation of New Zealand sovereignty. However, the Greenpeace and Pereira proceedings were more in the nature of tort claims for compensation. The basis for the payment of compensation was to be France's generally admitted responsibility. The Pereira indemnity was simply agreed and paid over with no recorded argument as to its legal basis.³⁷ The Greenpeace compensation was eventually decided by arbitration, applying English law.³⁸ But it is not clear where, legally, these settlements should be located. They involve no national jurisdictions. Nor is it at all certain whether and where they may be placed within the domain of international law. It may be asked whether either Greenpeace (as a N.G.O.) or Pereira (as an individual) have for this purpose any international legal personality.³⁹ New Zealand had expressed some concern about the payment of compensation to Pereira's family and to Greenpeace⁴⁰ but had not formally adopted the claims on their behalf (neither possessed any New Zealand nationality). At the most, it would seem that these matters were resolved in a vague, uncertain hinterland of international law.

In fact, it appeared that the Greenpeace—France settlement⁴¹ was based on the least amount of legal argument possible. The provision in the Compromise for arbitration stated that "... responsibility for the calamity ... not being in dispute ... the arbitrators who are appointed will have as their task to pronounce on the only point remaining at issue between the parties, namely the question of the amount of damages ..." Moreover, it was agreed to keep the reasoning and proceedings of the arbitration tribunal confidential and only publicise the decision as to the amounts of compensation and allocation of costs. However, despite the minimal reference to law and avoidance of status as a precedent, this was clearly a seriously considered *legal* procedure. The provision for arbitration imported a high degree of formality, leading to a binding outcome and linking with wider arbitral practice (through the designation of the third arbitrator by the President of the Swiss Federal Court); and there was a categorical provision for the application of English law and the common law

³⁷ The French Government issued a statement that it paid "to the relatives of Mr Fernando Pereira indemnities which have been accepted by them (totalling 2.3 million Francs, in addition to the 30,000 Guilders paid by the victim's insurers and reimbursed to them by France)".

³⁸ The arbitration here would appear to be distinguishable in a number of respects from the large number of "commercial" arbitrations involving disputes between individuals and States. On the latter see generally: Stephen J. Toope, *Mixed International Arbitration: Studies in Arbitration between States and Private Persons* (Cambridge: Grotius Publications, 1990). Even in relation to this well-established category of dispute resolution, there may be some difficulty of classification. Toope asks whether such arbitration should be regarded as a procedure to adjust private rights or an international legal process.

³⁹ The Stichting Greenpeace Council is an organisation established under Dutch law and so has legal personality under that legal order. There has been a good deal of discussion of its representative capacity under both EC law (Case T-585/93, *Stichting Greenpeace Council v Commission* (1995) E.C.R. II-2205) and English law (*R v HMIP and MAFF ex parte Greenpeace* [1994] 4 W.L.R. 352). It was held not to have a sufficient interest for purposes of judicial review under EC law, but did have such standing under English law.

⁴⁰ See Ruling No. 7, Conciliation Proceedings, *supra* note 9, referring to French assurances regarding the arrangements for compensation.

⁴¹ As provided for in the Compromise of 19 December 1985 between France and the "Stichting Greenpeace Council". The latter was here acting in its own name and in the name of organisations affiliated to Greenpeace and of the owner and operators of the *Rainbow Warrior*.

concept of aggravated damages to the substance of the matter. The process therefore was undoubtedly some kind of legal process but its quality as such has uncertainty around the edges. For instance, how should the "binding" nature of the award be understood—in the event of one party not complying with the arbitrators' decision, what rules of enforcement would come into play?

Perhaps the most sensible reading of this process is to regard it as part of the international legal order, but in doing so, thereby recognise some dynamic and innovative aspects of what was happening. On the one hand, this may be put forward as evidence of the evolving nature of international legal personality, in that there is a recognition of the legal personality of a non-governmental corporate actor such as Greenpeace, at least for purposes of pursuing claims against States, at the international level. On the other hand, it may also serve to demonstrate the way in which the international legal order may requisition rules of national law for particular purposes. The latter then provides further evidence of a dynamic interaction between two types of legal order, which also once again obscures the boundaries between them.

VII. FRANCE VERSUS THE REST OF THE WORLD: TESTING AT MURUROA ATOLL

As seen in the above presentation of narratives, one way of viewing the *Rainbow Warrior* incident and its aftermath would be as an episode within a longer and wider story concerning the acceptability and legality of nuclear weapons testing. It may be useful to think about the *Rainbow Warrior* case as part of that broader picture, in order to gain some understanding of the arguments and resolution of the more specific dispute. Conversely, what has been said above about *Rainbow Warrior* may aid an appreciation of the bigger issue of nuclear weapons testing and how the political and legal debate on that question has unfolded over a period of forty years or more. From a specifically legal perspective, such a reading may also supply some insight into the methodology of international law construction.

France has been at the forefront of the evolving debate on nuclear testing, although in an essentially defensive position in relation to the mounting body of critical argument concerned with the adverse environmental impact of such activity. As a major nuclear power, France had originally carried out atmospheric tests in Algeria, until the independence of the latter in 1962; subsequently, from 1966 it carried out tests at Mururoa Atoll in French Polynesia, first of all in the atmosphere and since 1974 underground. It was during this period of underground testing that the *Rainbow Warrior* incident occurred. The French programme of testing ended in 1992, to comply with guidelines under the Non-Proliferation Treaty, but was resumed by the Chirac Government in 1995. The renewed series of tests provoked considerable international criticism (as discussed below) and was finally ended in 1996. Since then France has both signed and ratified (in 1998) the *Comprehensive Test Ban Treaty* and for practical purposes may now be considered to be no longer a nuclear testing power. But historically France has served as a kind of lightning conductor for political and legal argument.

In legal terms, the last half century may be seen generally as a period of progressive outlawing of nuclear weapons testing,⁴² in particular through the *Partial Test Ban Treaty* of 1963, the *Non-Proliferation Treaty* of 1968, the *Nuclear Test Cases* brought by Australia and New Zealand against France in 1974, and the *Comprehensive Test Ban Treaty* of 1996. Full prohibition of nuclear testing as a matter of international law awaits a target number of ratifications of the 1996 Treaty, which will need to include those of China and the US, which are still not forthcoming. Nonetheless, the trend of legal development is clear enough:

⁴² See in particular the comments of the ICJ in *Legality of the Threat or the Use of Nuclear Weapons Case*, Advisory Opinion, [1996] I.C.J. Rep. 226, at paras. 58 and 62.

there is a strong majority of opinion in favour of prohibition (175 States have signed and 121 States have ratified the Treaty).

What is of present interest is the pattern of legal argument and debate over this period and in particular the sites of this legal discourse. A survey over the last fifty years reveals a wide participation in this international political and legal discourse, including not only States and intergovernmental organisations, but also N.G.Os, individuals and the scientific community, providing a kind of "civil society" contribution to the debate and construction of norms. There is space here only to summarise this range of critical activity.

At the governmental level, there had from the 1950s been an increasing level of concern on the part of some governments regarding the desirability of nuclear testing and this may be mapped by reference to support for UN resolutions and occasional treaties, relating to the law of the sea or more specifically to nuclear testing.⁴³ American and French testing in the Pacific Ocean had provoked particular concern on the part of Pacific Rim States such as Japan, Australia and New Zealand, so that it is unsurprising to find that such countries were in the forefront of international efforts to outlaw the activity, evidenced strongly for example by involvement in the *Nuclear Test Cases* in 1974, and the adoption of regional treaties such as the *Tlatelolco Treaty*⁴⁴ (South American States) and the *Raratonga Treaty*⁴⁵ (the South Pacific Forum). Geographical location and political sympathy also made such countries the natural point of departure for the protesting activities of organisations such as Greenpeace from the 1970s onwards. By 1995 it is no surprise to discover that the forty or so sponsors of a UN General Assembly (UNGA) resolution⁴⁶ calling for an immediate end to nuclear tests and deploring those already conducted were predominantly from the Pacific rim and South America. A more specific and intriguing example of governmental criticism, which threatened to spill into the legal arena, is provided by the anti-nuclear boycott of French commodities voted by the Parliament of the Australian Capital Territory (ACT) in September 1985. This action led to a response from the French ambassador to Australia, stating that the ACT action could constitute "a discriminatory act, according to treaties and conventions governing international trade, and could lead to legal proceedings".⁴⁷ Altogether, there has over the last fifty years been a vigorous debate on the part of governments, demonstrated in a variety of ways, ranging from protesting activities such as those involving ACT and France in 1995, formal legal argument as in the 1974 litigation before the International Court of Justice (ICJ), or regular discussion in fora such as the UNGA. The discussion preceding the adoption of the UNGA resolution later in 1995 reveals the legal ramifications of the argument for total prohibition of testing. For example, part of the draft preamble to the resolution provoked objections since it expressed concern about the "potential negative effects of underground nuclear testing on health and the environment" and some countries which had carried out tests were fearful that such a provision would trigger legal claims on the basis of past tests.⁴⁸ There is an important linkage between the development of basic principle on the subject and individual claims for compensation or violation of basic rights, which will be considered further below. Governmental activity of course feeds into that of intergovernmental organisations, a number of which have become sites for the expression of concern

⁴³ For example, see *supra* note 16 at 435-437.

⁴⁴ *Treaty for the Prohibition of Nuclear Weapons in Latin America (Tlatelolco Treaty)*, 14 February 1967, 634 U.N.T.S. 281.

⁴⁵ *South Pacific Nuclear Free Zone Treaty (Raratonga Treaty)*, 6 August 1985, 1445 U.N.T.S. 177; 24 I.L.M. 1440.

⁴⁶ UNGA, First Committee (Disarmament and International Security), Press Release GA/DIS/3043 (16 November 1995).

⁴⁷ French Ambassador Mr. Dominique Girard, "Legal proceedings against whom? Australia or the ACT?" *Reuters* (27 October 1995). The argument raises questions about the international legal responsibility and personality of the latter.

⁴⁸ *Supra* note 46.

about the effects of nuclear testing. In addition to the majority view within the UNGA, for instance, organisations such as the European Union (EU) and International Atomic Energy Agency have called for scientific evaluation of the environmental and health risks of nuclear testing.

There has also been a notable "civil society" dimension to the continuing international debate on nuclear testing, comprising an amalgam of informed opinion, organised protest and legal claims brought by both individuals and representative N.G.Os. Much of this kind of activity was clearly evident at the time of the resumption of testing by France in 1995. Thus the French National Union of Scientists publicly condemned the policy of the French Government and circulated petitions demanding that the tests not be resumed;⁴⁹ on Bastille Day, 14 July 1995, there were public demonstrations in Wellington, Sydney and Fiji; there were popular boycotts of French products during 1995; and there was continuing action on the part of Greenpeace. As a powerful international N.G.O., the latter organisation has since the 1970s contributed significantly to the public legal debate on environmental issues. Additionally, its confrontational campaigning strategies have led to political and legal action, the destruction of the *Rainbow Warrior* in 1985 being the most dramatic example of the role of Greenpeace as a catalyst for political and legal development. The events of 1985 served to bring New Zealand into formal legal confrontation with France, and cast the latter as an international delinquent resorting to State terrorism, so significantly colouring the wider legal debate on nuclear testing. The tactics adopted by Greenpeace demonstrate the ability of a well-resourced N.G.O. to exploit legal opportunities within the longer-term process of international discourse. Thus in 1995 Greenpeace tested, politically and legally, the 12-mile exclusion zone declared by France around the Mururoa test site, resulting in the seizure by the French navy of two Greenpeace vessels, *Rainbow Warrior II* and *MV Greenpeace*, for entering the exclusion zone, and subsequent legal claims by Greenpeace in respect of the seizure of the vessels. Greenpeace has shown itself to be an indefatigable litigant in numerous jurisdictions. In July 1995 it brought an action before the French *Conseil d'Etat* challenging the legality of the presidential decision to resume nuclear testing, arguing that it was contrary to key principles contained in the 1995 law on reinforcing environmental protection.⁵⁰ At the same time, Greenpeace sought a formal challenge of the legality of the French policy in another arena by urging the European Commission to take legal action against France for violation of obligations under the Treaty Establishing the European Atomic Energy Community (Euratom Treaty)⁵¹. The Commission was also under pressure from some members of the European Parliament⁵² to bring proceedings against France before the European Court of Justice, but decided that there were insufficient grounds for initiating such action.⁵³

One further significant site of legal argument has been that of litigation involving individuals. Predictably, some of this has arisen from claims against enforcement action, for instance in relation to the exclusion zone declared by France and the expulsion from French territory of Greenpeace personnel. The wider international implications of some of this enforcement activity is demonstrated by a statement issued by the Australian Government in September 1995:

While the French authorities had the right to intercept the *Rainbow Warrior* once it entered the 12 nautical mile territorial sea and exclusion zone, the arrest of the *Greenpeace* just outside the zone has no obvious legal justification, and we will be

⁴⁹ Kimberley Carr, "French physicists attack bomb tests", *Nature* (29 June 1995).

⁵⁰ "Nuclear Tests: Greenpeace to take Chirac to France's Supreme Court", Press Release, Paris (26 July 1995), online: <<http://archive.greenpeace.org/comms/rw/jul26.html>>.

⁵¹ Signed on 25 March 1957, the EURATOM Treaty is one of the founding treaties of the European Union.

⁵² *Europe*, No. 6532, 29 July 1995.

⁵³ The Commission had a responsibility to assess whether the tests constituted dangerous experiments. On its negative decision see: Reuter, 24 October 1995.

seeking an explanation for it. The French military actions graphically demonstrate the extent to which France is now prepared to go in pursuing its test program in the face of condemnation from practically the whole of the rest of the world. We again call upon the French Government to exercise restraint in the way in which it deals with the protests which it will inevitably face if it proceeds with its tests.⁵⁴

In proceedings which were complementary to Greenpeace's attempt to force the European Commission to take action against France under the EURATOM Treaty, a number of French Polynesian inhabitants sought to challenge the legality of the Commission's findings and secure interim protection, again invoking Article 34 of the Euratom Treaty. The European Court of First Instance held this claim to be inadmissible since the three claimants could not show a sufficient interest, in the sense of being especially affected in a way which differed from other inhabitants of Tahiti.⁵⁵ Further litigation by individuals comprised claims of violation of basic human rights. This was brought by a number of individuals as citizens of French Polynesia, under both the *European Convention on Human Rights* (ECHR)⁵⁶ and the *International Covenant on Political and Civil Rights* (ICCPR).⁵⁷ Both claims, based on alleged violation of the right to life and right to privacy and family life, were held to be inadmissible. The Human Rights Committee, in applying the ICCPR, was not convinced that the claimants were "victims" of a violation in the sense of having convincing scientific evidence of such a risk to life in the circumstances of the Murutoa tests. The reasoning here was as murky as that of the European Commission in the Euratom case, since the Human Rights Committee at the same time reiterated the terms of its General Comment Number 14 on nuclear weapons, that it was "evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threat to the right to life which confront mankind today".⁵⁸ But these are notoriously difficult evaluations of risk, which bedevil the development of norms in this context.

The point of argument to note for present purposes is that similar arguments were being deployed in different legal contexts, all of which added incrementally to a hardening sense of international normativity on the subject. But notably, N.G.Os, individuals and other groups have contributed significantly to this process of international legal development, qualifying the traditional idea that this is primarily the business of States and governments. The identity of the participating actors is much more complex and uncertain of definition.

VIII. INTERNATIONAL LAW IN A MULTI-LEVEL ENVIRONMENT

Some general points and questions may be extrapolated from this exercise. Firstly, of course, putting the narratives together enhances insight and understanding of the political and legal dispute and its origin and context. Yet at the same time the various narratives cannot be merged into a single account, since that would be virtually impossible to tell or read (at least in a comprehensible manner). Each narrative needs to be read in succession to gain the fuller picture. Secondly, it should be noted that the same actors adopt different personae, certainly in terms of their formal behaviour and arguments, in the different contexts presented by the

⁵⁴ Australian Government press release, "French Action Against Greenpeace Vessels" (3 September 1995) online: <www.dfat.gov.au/media/releases/foreign/1995/m106.html>. This statement contains an instructive mix of political and legal argument. The Australian Government is making *political* use of arguments concerning the *legality* of French *policy*, while also indicating its *political* patronage of Greenpeace by something rather like old style (*legal*) diplomatic protection.

⁵⁵ Case T-219/95R, *Danielsson v Commission*, (1995) E.C.R. II-3051.

⁵⁶ Case No 28204/95, before the Commission on Human Rights; declared inadmissible, 4 December 1995.

⁵⁷ *Mrs. Vaihere Bordes and Mr. John Temeharo v. France*, Communication No 645/1995, U.N. Doc. CCPR/C/57/D/645/1995 (1996).

⁵⁸ *Ibid.* at para. 5.9.

narratives and that this should be understood as an important feature of the political and legal environment.⁵⁹ Thirdly, there are some intriguing reflections on the nature of identity and personality: in particular, for instance, on the division of personality between the French State and its agents, and of the rather uncertain personality of Greenpeace (or its Council?) hovering around the hinterland of national and international legal spaces.

Finally, and more specifically in relation to the matter of legal ordering, there is the question raised at the beginning of this discussion - how entangled now are the international, supranational (European) and national legal orders? The *Rainbow Warrior* incident and its wider context of the debate on nuclear testing reveal a very complex web of mutual interaction. The formal boundaries may remain, but the practical inter-penetration is undeniable.⁶⁰ Moreover, sophisticated actors, ranging through inter-governmental organisations, governments, N.G.Os and even individuals, are attuned to the possibility of exploiting legally and politically this multi-layered and interactive environment of governance and jurisdiction. Certainly at Greenpeace they appear to appreciate the rules of this game. Readers of the international scene need to do likewise.

⁵⁹ The same may be true of other types of environment. Compare, for instance, the recent project by film maker Woody Allen to present the same story and characters in terms of both comedy and tragedy in his film *Melinda and Melinda*.

⁶⁰ This would not be to say, however, that it all, really, constitutes a single order, rather as Jessup suggested in his concept of "transnational law". Jessup pointed out the way in which the international legal order is achieved through the medium of internal State law, longstanding custom, and rules of practice and convenience accepted by both private actors (such as merchants) and governments and that "the traditional divisions between public international law and private international law and even some national law might be submerged in an ocean of 'transnational law'". See Philip C. Jessup, *The Thomas M Cooley Lectures (Eighth Series)* (Ann Arbor: University of Michigan Law School, 1959) at 63. The better analogy is perhaps a series of overlapping, superimposed and transparent plates, like acetates placed over each other. See for instance the analysis presented in Harding, *supra* note 28.